IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ACCU-FIRE FABRICATION, INC.,	)	
	)	
Claimant,	)	
	)	C.A. No. 08L-09-048 PLA
v.	)	
	)	
CORROZI-FOUNTAINVIEW, LLC, and CORROZI BUILDERS, LLC,	)	
	)	
	)	
Defendants.	)	

ON DEFENDANTS' MOTION TO DISMISS
GRANTED

Submitted: December 2, 2008
Decided: March 3, 2009

Robert K. Beste, Esquire, SMITH, KATZENSTEIN & FURLOW LLP, Wilmington, Delaware, Attorney for Plaintiff.

Scott G. Wilcox, Esquire, THE BAYARD FIRM, P.A., Wilmington, Delaware, Attorney for Defendants.

ABLEMAN, JUDGE

I. Introduction

Defendants Corrozi-Fountainview, LLC ("Fountainview") and Corrozi Builders, LLC ("Corrozi Builders") move to dismiss a mechanic's lien Statement of Claim filed by Accu-Fire Fabrication, Inc. ("Accu-Fire") on two grounds: (1) failure to apportion amounts owed between three condominium buildings against which liens were sought; and (2) failure to join the contractor that purchased materials from Accu-Fire. Accu-Fire contends that lien amounts were apportioned to the extent possible, because some materials were used throughout the condominium complex. Accu-Fire further argues that the contractor with whom it had a written agreement to supply materials cannot be named as a defendant because it is in bankruptcy.

The Court finds that Accu-Fire's claim is not defective for failure to apportion. The Court concludes, however, that the contractor with whom Accu-Fire entered into its material supply agreement is a necessary party in this action and could have been named, notwithstanding its bankruptcy filing. Accordingly, for the reasons set forth herein, Defendants' Motion to Dismiss will be granted.

II. Facts

Defendant Fountainview owns a condominium complex that includes three buildings located at 1000, 2000, and 3000 Fountainview Circle, in Newark ("the buildings"). Defendant Corrozi Builders acted as general contractor on a series of alterations, repairs, and improvements to Fountainview's complex. In 2007, Corrozi Builders hired Pyro-Tech, LLC ("Pyro-Tech") to alter or repair fire protection systems in the buildings.

Pyro-Tech contracted to purchase materials from Accu-Fire, which manufactures fire protection products. Accu-Fire provided Pyro-Tech with materials, including pipes and fittings for sprinkler systems, from November 17, 2007, through March 5, 2008. According to Accu-Fire, the materials were furnished on the credit of the buildings.[1]

Accu-Fire alleges that Pyro-Tech failed to pay amounts due upon proper demand.[2] On September 5, 2008, Accu-Fire filed a Statement of Claim in this Court, seeking a mechanic's lien against the buildings in the amount of $53,778.26. Of the total amount claimed, Accu-Fire states that "at least" $40,301.62 is due for materials used in 3000 Fountainview Circle,

[1] Docket 1 (Statement of Claim for Mechanic's Lien), ¶10 & Ex. B.

[2] *Id.*, ¶ 12-15.

with the balance of $13,476.64 "due for all [s]tructures."[3] Accu-Fire's Statement of Claim named only Fountainview and Corrozi Builders as defendants (collectively, "Defendants"). Accu-Fire also filed a praecipe seeking a writ of scire facias sur mechanic's lien against Defendants, but not against Pyro-Tech.[4] Accu-Fire's Statement of Claim asserts that Pyro-Tech could not be joined as a party because it has entered bankruptcy.

III. Parties' Contentions

Defendants have filed a Motion to Dismiss Accu-Fire's Statement of Claim. Defendants argue that the Statement of Claim contains two defects: (1) Accu-Fire's failure to join Pyro-Tech, which Defendants contend is an essential party; and (2) Accu-Fire's failure to sufficiently apportion the lien amount between the buildings at 1000, 2000, and 3000 Fountainview Circle, as required by 25 *Del. C.* §§ 2712(10) and 2713.[5] Defendants urge that, because they were not parties to the contract between Accu-Fire and Pyro-Tech, which forms the basis of Accu-Fire's claim, they cannot properly defend themselves unless Pyro-Tech is named as a defendant. Because the statutory period for filing a mechanic's lien claim under 25 *Del. C.* § 2711

[3] *Id.*, ¶ 16.

[4] Docket 1 (Praecipe).

[5] Docket 4 (Defs.' Mot. to Dismiss), ¶ 4.

has passed, Defendants seek to have Accu-Fire's Statement of Claim dismissed.

In response, Accu-Fire argues that it did apportion its claim among the buildings by stating that $40,301.62 was due for 3000 Fountainview Circle. Accu-Fire asserts that the $13,476.64 remaining balance reflects materials "used *throughout* the complex," which it was not required to allocate among the three buildings in the Fountainview complex.[6]

Accu-Fire also contends that it could not have named Pyro-Tech in its Statement of Claim because the instant action would be subject to the automatic stay imposed by federal bankruptcy statutes. Furthermore, Accu-Fire argues that Pyro-Tech is not a necessary party because the named defendants benefited from the materials Accu-Fire supplied and are on notice as to the amounts due to Accu-Fire. Thus, Accu-Fire claims that Pyro-Tech's absence from its action does not prejudice either named defendant.[7]

[6] Docket 6 (Pl.'s Resp. to Defs.' Mot. to Dismiss), ¶ 7.

[7] *Id.*, ¶ 3.

IV. Standard of Review

Upon a motion to dismiss, the Court subjects a statement of claim to a broad test of sufficiency.[8] Dismissal is appropriate only if it is reasonably certain "that the plaintiff could not prove any set of facts that would entitle him to relief."[9] A plaintiff's claim will not be dismissed unless it clearly lacks factual or legal merit.[10] When considering a motion to dismiss, the Court will accept all well-pleaded allegations as true.[11] In addition, every reasonable factual inference will be drawn in favor of the plaintiff.[12]

V. Analysis

1. Failure to Apportion

The record lacks the factual development necessary for the Court to determine whether the claimed amounts were properly allocated among the three buildings against which liens are sought. The mechanics' lien statute requires that a party filing a claim for materials against two or more

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[8] *C&J Paving, Inc. v. Hickory Commons, LLC*, 2006 WL 3898268 (Del. Super. Jan. 3, 2007).

[9] *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998) (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).

[10] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

[11] *Spence v. Funk*, 396 A.2d at 968; *Wyoming Concrete Indus. Inc., v. Hickory Commons, LLC II*, 2007 WL 53805, at *1 (Del. Super. Jan. 8, 2007) (citing *Ramunno*, 705 A.2d at 1036).

[12] *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005).

structures "owned by the same person for building, altering or repairing [two] or more structures owned by the same person" must, "at the time of filing such joint claim, designate the amount which he claims to be due to him on each of such structures."[13] The failure to designate the amount owed on each structure can invalidate the lien claim.[14]

Where the apportionment requirement confronts the realities of "more complex forms of property ownership," the Court has held that "the meaning of 'structure' for purposes of the mechanics' lien statutes is altered according to the nature and purpose of the labor or materials supplied."[15] When labor or materials are provided to a property consisting of multiple buildings or units, the key consideration is whether the labor or materials benefited only a particular building or unit, or inured to the benefit of the property as a whole. For example, as the Court explained in *Wilmington Trust Co. v. Branmar, Inc.*:

> [I]n a mechanics' lien claim made upon an attached row of 'townhouse' condominia[,] . . . to the extent labor or materials are supplied in and solely for the benefit of a condominium townhouse, each townhouse is a separate 'structure' within the

[13] 25 *Del. C.* § 2713; *see also* § 2712(10) ("The complaint and/or statement of claim shall set forth . . . [t]he amount which plaintiff claims to be due him on each structure.").

[14] *Active Crane Rentals, Inc. v. Formosa Plastics Corp.*, 1987 WL 847759, at *3 (Del. Super. Dec. 29, 1987).

[15] *Wilm. Trust Co. v. Branmar, Inc.*, 353 A.2d 212, 215 (1976).

> meaning of 25 *Del. C.* § 2713, even though it lies under the same roof as other townhouse units. To the extent that labor or materials are supplied for the benefit of the common elements of the row of townhouses, however, the entire row may constitute a single 'structure' for mechanics' lien purposes.[16]

Similarly, in *Kershaw Excavating Co. v. City Systems, Inc.*, the Delaware Supreme Court held that where the claimant performed paving, curbing, and other work in external areas of a multi-building condominium complex, it sufficiently apportioned the lien amounts by designating the amounts due for each building.[17] Because the work benefited each building as a whole and no work was performed on any individual condominium unit, the claimant was not required to apportion the lien amounts owed by unit.[18]

Here, Accu-Fire argues that a portion of the materials were used "throughout the complex." If, as appears likely, the materials were used in *different buildings* "throughout the complex," then each building will be treated as a separate "structure" within the meaning of the statute, and Accu-Fire's Statement of Claim would be defective for failure to apportion. Even if the materials were used in external areas and not "in" a given building, *Kershaw* suggests that apportionment between the different condominium

[16] *Id.* (citing *Ramsey v. DiSabatino*, 347 A.2d 659 (1975)).

[17] 581 A.2d 1111, 1114-15 (Del. 1990).

[18] *Id.*

towers within the complex is required to the extent that the materials benefited specific buildings.

Nevertheless, because none of the parties have offered a precise account of where the materials not apportioned to 3000 Fountainview Circle were installed, the possibility remains that the materials were used in common areas benefiting the entire complex. This possibility precludes dismissal of the claim based on Accu-Fire's failure to completely apportion amounts amongst the three buildings.

2. Failure to Name Pyro-Tech

Although Accu-Fire's failure to more precisely apportion the lien amount does not require dismissal at this stage, the Court finds that Pyro-Tech was a necessary party and could have been named as a defendant even if it is in bankruptcy. For the reasons explored in this section, the Court holds that this defect requires dismissal of Accu-Fire's claim.

A. Pyro-Tech Is a Necessary Party

As an initial matter, Delaware case law leaves no doubt that the contractor with whom a materialman enters into a contract is a necessary party to a mechanic's lien action.[19] This principle is not found in the

[19] *See, e.g.*, *Finnegan Const. Co. v. Robino-Ladd Co.*, 354 A.2d 142 (Del. Super. 1976) ("The purpose of requiring a general contractor's presence as a defendant in the mechanic's lien action is that he was the party with whom the subcontractor had his

mechanics' lien statute, but is a long-standing requirement rooted in the potential hazards of imposing a lien upon the property of a property-owner who may not have been a party to the agreement that forms the basis of the materialman's claim. Joining the contractor protects the owner, "against whom [the] statute operates with sufficient hardship, if properly and fairly construed," from being "forced to defend against a claim of a subcontractor of which he may know nothing."[20] Often, the contractor will be "the only one who knows of the services or materials furnished by the subcontractor and the prices at which they were agreed to be furnished," and is in a better position than the owner to challenge or offer defenses to the subcontractor's claim.[21] Furthermore, the principal contractor is necessary because the lien claim may affect its rights as against the owner.[22]

In this case, Accu-Fire does not contest that its contract was with Pyro-Tech, not the named defendants. Contrary to Accu-Fire's argument that Defendants are not prejudiced because they have been notified of the

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contract."); *Iannotti v. Kalmbacher*, 156 A. 366, 367-68 (Del. Super. 1931) ("The overwhelming weight of authority sustains the view that the principal or original contractor is a necessary party to a proceeding to enforce a claim arising under a Mechanics' Lien Statute").

[20] *Westinghouse Elec. Supply Co. v. Franklin Inst. of Pa. for Promotion of Mech. Arts*, 21 A.2d 204, 206 (Del. Super. 1941).

[21] *Iannotti v. Kalmbacher*, 156 A. at 367.

[22] *Id.*

amount of Accu-Fire's claim, Pyro-Tech is a necessary party.[23] Unless Pyro-Tech is a party to the instant action, the named defendants have no way of ascertaining the accuracy of the claim amount or the existence of defenses based on the contract.

Having concluded that Pyro-Tech is a necessary party, the Court must address Accu-Fire's assertion that naming Pyro-Tech was not feasible because of Pyro-Tech's bankruptcy.[24]

B. Perfection of a Delaware Mechanic's Lien Does Not Violate Bankruptcy Stay

Upon the filing of a bankruptcy petition, § 362(a) of the Bankruptcy Code establishes an automatic stay of actions to create or enforce claims against a debtor or the property of the bankruptcy estate.[25] Acts taken in

[23] Accu-Fire's Response expresses the sentiment that "Defendants' allegation that they are unable to defend against Accu-Fire's claims because Pyro-Tech was not named in the claim is absurd." Docket 6, ¶ 3. This statement was surprising, not only for the level of vitriol it injected into the usually staid arena of mechanics' lien claims, but also for its disregard of established and quite reasonable case law. Although the law is not immune from absurdities, the rule that contracting parties must be named in mechanics' lien claims is not one of them.

[24] *See* Super. Ct. Civ. R. 19.

[25] 11 U.S.C. § 362(a).

violation of the stay are void.[26] Generally, the automatic stay applies to bar actions to enforce a mechanic's lien against the debtor.[27]

Although broad in scope, the automatic stay is subject to numerous exceptions. At issue in this case is the exception provided in § 362(b)(3), which exempts from the automatic stay "any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) . . . ." Section 546(b) establishes certain limits on the trustee's avoiding powers. In relevant part, § 546(b) provides that "[t]he rights and powers of a trustee . . . are subject to any generally applicable law that . . . permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection[.]"[28] Thus, § 546(b) will apply to restrict the trustee's avoiding power where "an interest is created prior to bankruptcy and its post-petition perfection relates back, as a matter of law, to the date of its creation."[29]

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[26] *See, e.g.*, *In re Coated Sales, Inc.*, 147 B.R. 842, 845 (S.D.N.Y. 1992).

[27] *See* 11 U.S.C. § 362(a)(4).

[28] 11 U.S.C. § 546(b).

[29] *See Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp*, 884 F.2d 80, 85 (3d Cir. 1989).

Delaware's mechanics' lien statute falls within the purview of § 546(b). Under the statute, a lien obtained under the mechanics' lien statute "shall relate back to the day upon which . . . the furnishing of material was commenced."[30] As a result of this relation-back feature, the Delaware mechanics' lien statute constitutes a "generally applicable law" permitting "perfection of an interest in property . . . effective against an entity that acquires its rights in such property before the date of perfection," as contemplated by § 546(b).[31] Accordingly, any act to perfect a Delaware mechanic's lien will receive the benefit of exemption from the automatic stay under § 362(b)(3). In other words, while the Bankruptcy Code's automatic stay would bar *enforcement* of a Delaware mechanic's lien, it does not prevent the lien from being *perfected*.[32]

The Court is satisfied that Accu-Fire could have perfected a lien naming Pyro-Tech or Pyro-Tech's trustee as a defendant without violating the automatic stay. Under the mechanics' lien statute, enforcement is not a

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[30] 25 *Del. C.* § 2719.

[31] For purposes of § 546(b), the phrase "generally applicable" law applies to "those provisions of applicable law that apply both in bankruptcy cases and outside of bankruptcy cases." S. REP. No. 95-989, at 86 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5872.

[32] *Cf. In re B.J. Packing, Inc.*, 158 B.R. 988, 991 (Bankr. N.D. Ohio 1993) ("Section 546(b) permits the postpetition perfection of a mechanic's lien to be effective against a Trustee provided state law permits this result."); *In re Richardson Builders, Inc.*, 123 B.R. 736, 738-39 (Bankr. W.D. Va. 1990).

necessary prerequisite to perfection. Perfection is accomplished by filing a statement of claim that complies with the requirements imposed by statute and case law.[33] The mechanics' lien statute establishes a separate mechanism for enforcement by writ of scire facias.[34] Only issuance of the writ can "[bring] the parties into court for adjudication of the obligation on which the lien is based."[35] Before enforcement is initiated, the lien obtained by filing a statement is "cautionary," and "the amount and finality of the lien depend upon the judgment ultimately obtained upon . . . scire facias."[36]

In *Iannotti v. Kalmbacher*, the Court emphasized the conceptual distinction between perfection and execution of a mechanic's lien, as well as the potential for a temporal gap between the two steps:

> No process issues as a matter of course upon the filing of the statement, but such process awaits the specific action of the claimant. Possibly one of the defects of the Mechanics' Lien Statute exists in the fact that a considerable time may elapse between the obtaining of the cautionary lien by the filing of the

[33] *See Active Crane Rentals, Inc. v. Formosa Plastics Corp.*, 1987 WL 847759, at *1 (Del. Super. Dec. 29, 1987); *First Fla. Bldg. Corp. v. Robino-Ladd Co.*, 1980 WL 324483, at *2 (Del. Super. Nov. 12, 1980).

[34] 25 *Del. C.* § 2714(a) ("The proceedings to recover the amount of any claim [under the mechanics' lien statute] shall be by writ of scire facias.").

[35] *First Fla. Bldg. Corp*, 1980 WL 324483, at *2.

[36] *Dukes Lumber Co., Inc. v. Reilly*, 1992 WL 148023, at *4 (Del. Super. June 5, 1992) (quoting *Armstrong & Latta Co. v. Wilm. Sugar Refining Co.*, 120 A. 94, 97 (Del. Super. 1922)).

> statement and the subsequent issuance of scire facias proceedings thereon.[37]

Although the Court's rules have changed since *Iannotti* was decided, perfection is still a separate step from enforcement, which can only be initiated by the claimaint's seeking a writ of scire facias.[38] This apparent shortcoming of the statute resolves the question of how a claimant is to pursue a mechanic's lien claim when a necessary party has entered bankruptcy prior to perfection. The claimant can perfect a lien by filing a valid statement of claim without violating the automatic stay, by virtue of the exception set forth in § 362(b)(3) of the Code. The claimant may simply forego the filing of a writ of scire facias, or, if a writ of scire facias is filed against the bankrupt defendant, it will be void as a result of the automatic stay. Once the lien is perfected by the filing of a valid statement of claim, the case can be stayed by this Court to protect the interests of all parties pending proceedings in Bankruptcy Court.[39]

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[37] 156 A. at 368.

[38] *See* Super. Ct. Civ. R. 3(a) ("[A]n action is commenced by the filing with the Prothonotary a complaint or, if required by statute, . . . a statement of claim . . . and a praecipe directing the Prothonotary to issue the writ specified therein."); R. 4(a) ("Upon the commencement of an action, the Prothonotary shall forthwith issue the process specified in the praecipe . . . .").

[39] The Court has stayed mechanics' lien actions prior to final judgment in other cases involving bankrupt defendants. *See, e.g., Griffin Dewatering Corp. v. B.W. Knox Const. Corp*, 2001 WL 541476, at *1 (Del. Super. May 14, 2001); *Masten Lumber and Supply Co. v. Matthews*, 1997 WL 718648, at *1 (Del. Super. Aug. 19, 1997).

Although the issue has not been explored by the parties, the Court notes that *Westinghouse Electric Supply Co. v. Franklin Institute* suggests that a mechanic's lien claimant might be permitted to amend the writ of scire facias after the statutory period for filing a statement of claim has run.[40] In *Westinghouse*, the subcontractor claimant identified the general contractor in the body of its statement of claim, but failed to name the general contractor as a party defendant in the caption or in the praecipe upon which the writ of scire facias was issued. After the period for filing a statement of claim had passed and the writ of scire facias had been issued and returned, the claimant moved to amend the writ by adding the general contractor as a defendant.[41]

In *Westinghouse*, the Court permitted the filing of a rule to show cause why the general contractor should not be made a party defendant.[42] As the *Westinghouse* Court noted,

> [t]he mere fact that the general contractor . . . was not made a party defendant under the caption . . . in the statement of claim is of no consequence, as the creation of essential parties does not originate until the praecipe is filed, upon which the writ of scire facias is duly issued.[43]

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[40] *Westinghouse Elec. Supply Co.*, 21 A.2d at 207-08.

[41] *Id.* at 205-06.

[42] *Id.* at 207-08.

[43] *Id.* at 206 (citing *Iannoti*, 156 A. at 368).

Subsequent cases have emphasized that because "joinder of the contractor as a party is not a statutory requirement, failure to do so could be corrected later."[44]

In this case, while Pyro-Tech is in bankruptcy, any attempt to add it to the writ would be void as an enforcement action in violation of the automatic stay. However, even if Pyro-Tech's bankruptcy were cleared, *Westinghouse* does not salvage Accu-Fire's claim.

Westinghouse is distinguishable from this case in several respects. First, and most crucially, Accu-Fire has not moved to amend the writ of scire facias, but rather has taken the position that its failure to name Pyro-Tech as a defendant is not fatal to its claim. Furthermore, the Statement of Claim in this case, unlike in *Westinghouse*, affirmatively indicated to the named defendants that Pyro-Tech would not be joined. In light of this, permitting Pyro-Tech to be added to the writ as a party defendant long after the statutory time period for filing a claim has run, and after Accu-Fire has repeatedly expressed an intent *not* to name Pyro-Tech, would prejudice both the currently-named defendants and Pyro-Tech.

Because Pyro-Tech was a necessary party and could have been named in Accu-Fire's Statement of Claim, the statement is defective. This defect

[44] *First Fla. Bldg. Corp*, 1980 WL 324483, at *2.

cannot be cured by amending the statement, because the statutory period for filing a statement of claim has passed.[45] The praecipe also fails to name Pyro-Tech, and Accu-Fire has not sought to amend it. Accordingly, Defendants' Motion to Dismiss will be granted.

VI. Conclusion

For the foregoing reasons, Defendants' Motion to Dismiss the Statement of Claim is hereby **GRANTED.**

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Robert K. Beste, Esq.
Scott G. Wilcox, Esq.

[45] 25 *Del. C.* § 2711(b).